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**Wetlands Appeal Streamlining Regulations
310 CMR 10.05 and 310 CMR 1.00**

**Response to Comments
October 3, 2007**

Background

The Department of Environmental Protection ("MassDEP" or the "Department") typically receives more than 80 wetlands appeals each year. Many of these cases are resolved within 6 months through settlement and prescreening conferences. Many others take more than a year to resolve. On March 1, 2007, Governor Patrick directed MassDEP to reform the wetlands appeals process to allow for more timely action on these appeals, without reducing the level of environmental protection. The revisions to the appeal process explained below keep those parts that work well; prescreening, prefiled testimony and prior participation. But the revisions also make several fundamental changes by requiring parties to share information with one another and to present their evidence early in the proceedings, by establishing an early pre-screening conference and firm hearing date, and by imposing a presumptive 6-month timeline for the appeal to be resolved. In addition, once these new regulations are in place, MassDEP will hear and decide these appeals in-house using its experienced staff and counsel, retaining the option to transfer cases to the Division of Administrative Law Appeals, on a case-by-case basis where timely resolution of a matter will benefit from DALA's assistance.

General Response:

Many thoughtful public comments were received on the public hearing draft of the wetlands appeal streamlining regulations. The final regulation takes into account these comments as more specifically described below. The overall goal of these regulations continues to be conducting fair administrative appeals that allow the Department to make good environmental decisions in a timely way. MassDEP will update its website to include a frequently asked questions section on its wetlands appeal webpage and to ensure that the public knows how this process is changed.

10 residents:

Comments: A number of comments opposed limiting appeal rights to those with legal standing because it resulted in the exclusion of 10 resident groups. Comments asserted that residents have a significant non-financial stake in projects, including the right to enjoy wetlands and a right to protect the environment. Comments stated that the 10 resident appeal option is an important tool to ensure that protection. Comments suggested that 10 resident appeals are a necessary check on the Department, ensuring that environmental standards are met or surpassed. One comment suggested that the proposal was flawed and that the Department should start over. One comment suggested that the definition of 10 residents currently in 310 CMR 10.05(7)(a) should be changed to take into account watersheds.

Other comments supported the proposed regulation, agreeing that only those parties with legal standing should be permitted to initiate an appeal, and that regulations should not seek to expand the rights established in the Wetlands Protection Act (“WPA”). Comments noted that the WPA established a two-stage process for review, at the conservation commission and at MassDEP’s regional office, before an adjudicatory appeal and that expanding the adjudicatory appeal step is burdensome and has resulted in the backlog of administrative appeals.

Some comments noted that citizen participation remains available by right to intervene, through the conservation commission’s ability to appeal and by a showing of actual damages under M.G.L. c. 214, section 7A. One comment also suggested that intervention is too broad and should be narrowed to be consistent with the statute.

Response: MassDEP has revised the draft regulation to allow 10 residents to appeal. The definition of 10 residents in 310 CMR 10.05(7)(a) is taken directly from the Wetlands Protection Act.

Time line:

Comment: Many comments noted the long delays for projects with wetland impacts that go through the adjudicatory process. No comments disagreed that appeals go on too long, noting multiple experiences with appeals that took several years to complete. Some noted experience with appeals that took years to complete. Some commented that the 6-month timeline would be difficult to meet for a variety of reasons, including schedules for related bylaw appeals, and seasonally dependent reevaluations.

Some comments suggested that the time lines are too strict and would benefit only the well-heeled developer. Some asserted that 10 resident groups do not form without significant consideration of the time and money required to participate in the process so are not abusers of the system and, therefore, do not cause delays, but would be impacted by the proposed time lines. Others asserted that the time lines level the playing field because they are the same for applicants and others. Some noted that the appeal at this stage follows two prior reviews of a project; one at the conservation commission and one at MassDEP’s regional office, and that as a result all interested parties have had significant time to prepare and to identify their concerns.

Response: MassDEP is aware that these revisions will make it necessary to change adjudicatory appeals practice, both for the public and for MassDEP. It is important to note that the timelines are “presumptive” and can be extended by the Presiding Officer in extraordinary circumstances. For example, in the event that a seasonal delay is necessary, the Presiding Officer has the discretion to extend the timeline.

To assist in implementing the timelines in the regulations MassDEP has established regional prescreening and hearing days that are posted on our website. Prescreenings and hearings will be held on two days each month in each region and in Boston. These set hearing dates should enable applicants, appellants and MassDEP staff to plan ahead and to anticipate a likely prescreening and hearing schedule. It should also be more convenient for applicants and appellants alike to have prescreenings and hearings occur in the regional offices instead of in Boston. MassDEP continues to believe that the timelines set forth in the final regulation are fair and manageable, and will not sacrifice environmental protection even while expediting a process that currently takes too long to conclude. It is also important to note that timelines for resolution of legal disputes is a common practice in the litigation field. For example, the Massachusetts Superior Court has a Tracking Order System, and the U.S. District Court for the District of Massachusetts, has a Case Management System that establish filing deadlines and hearing dates for matters pending in each court.

Abutters:

Comment: Some comments objected to the limitation on automatic appeal rights that excludes abutters. Other comments were supportive of requiring a party to show aggrievement for the purpose of standing.

Response: Experience has shown MassDEP that in many instances, abutters presently do allege some type of aggrievement in their appeal. The removal of the automatic standing provision for abutters should not affect those types of appeals. Abutting property owners have a higher likelihood of being aggrieved by a project than property owners further removed. The new regulation simply requires the abutter to articulate that aggrievement. If the abutter is unable to do so, there is no compelling rationale for allowing the abutter to appeal.

Transfer to DALA:

Comment: Some comments suggested that MassDEP should not hold hearings and that all cases should be transferred to DALA. They stated that their concern is that MassDEP would not be able to give an independent and fair review of cases. One comment referred to past assertions by former MassDEP hearing officers that there was interference in their decision-making. Some comments were concerned with MassDEP’s staffing resources. Other comments suggested the reform should be to “fix DALA” rather than to revise the Department’s regulations. Additional funding of both DALA and MassDEP was suggested. One comment suggested that criteria be established for transfer of cases to DALA. Also, some comments complimented the MassDEP on the successes of the prescreening process.

Other comments supported conducting hearings as MassDEP. Some noted that MassDEP has been successfully conducting prescreenings for 3 years without incident. One comment stated that transferring cases from MassDEP to DALA is an error of public policy and that the alleged independence of DALA carries a significant price in loss of accountability, given that DALA magistrates are not accountable to any one with respect to timeliness or the policy content of their recommended decisions.

Response: MassDEP has effectively and independently conducted prescreening since 2004 through its Office of Appeals and Dispute Resolution (“OADR”). MassDEP intends to build upon this success in implementing the wetlands appeal process. Currently, the prescreening process resolves approximately 60% of all matters. No comments suggested that the prescreening process is unfair or biased. The same successful management practices that have been implemented for prescreening will be in place for wetland permit appeals. A long-standing regulation, 310 CMR 1.01(a)(1), authorizes MassDEP’s Commissioner to appoint experienced attorneys to serve as Presiding Officers. Presiding Officers are neutral hearing officers responsible for facilitating settlement discussions between the parties in administrative appeals, and to resolve appeals by conducting hearings and making Recommended Final Decisions on appeals. See 310 CMR 1.01(5)(a)15. They are staff members of OADR, separate and distinct from MassDEP’s Office of General Counsel (“OGC”). A Chief Presiding Officer, who reports to the Commissioner, supervises Presiding Officers.

Agencies commonly assign agency personnel to serve as Presiding Officers. Other Massachusetts agencies such as the Department of Fish and Game, the Department of Public Utilities, and the Massachusetts Water Resources Authority (“MWRA”) assign their agency personnel to serve as Presiding Officers for the agency. Connecticut’s Department of Environmental Protection also does this. Moreover, under 310 CMR 1.03(7), *ex parte* communications between Presiding Officers and MassDEP personnel regarding a pending appeal are expressly prohibited, and all MassDEP staff involved in the appeals process are trained regarding these requirements. Additionally, Recommended Final Decisions of Presiding Officers are subject to review by the Commissioner pursuant to 310 CMR 1.01(14). Under the regulation, the Commissioner may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision. All Final Decisions are subject to judicial review pursuant to G.L. c. 30A, § 14. These provisions ensure that the process will be fair and will result in unbiased decision-making. While MassDEP plans to conduct wetlands prescreenings and hearings, it retains the discretion to transfer cases to DALA and will work with DALA to ensure a smooth transition for any matter transferred.

Comment: One commenter suggested that parties should be able to petition for transfer to DALA for major or complex cases.

Response: MassDEP anticipates that some cases will be transferred to DALA. However, MassDEP also anticipates maintaining the capacity to hear such cases at MassDEP. In any case, the regulations do not direct where an appeal will be heard or processed. As a matter of implementation, MassDEP retains the discretion to transfer cases when it determines that a particular case, or the process will benefit from prescreening and or hearing at DALA. MassDEP will work with DALA to ensure a smooth transition for any matter transferred.

Prior Participation:

Comment: One commenter said no one submits written comments to Conservation Commissions and that it should not be a requirement to do so.

Response: This requirement has been in place since 2004 and remains unchanged by these revisions. Prior participation includes written submittals to the Conservation Commission, or to the Department prior to issuance of a superseding order or determination

Site Visit:

Comment: One commenter suggested that the requirement of a site visit should be clarified to ensure that visits cannot occur without the property owner and that protocols should be developed to make the purpose of the site visit clear.

Response: 310 CMR 10.05(7)(j)(2)(e) has been clarified to include language regarding the purpose of the site visit. The existing language stating that the applicant or property owner can establish “reasonable conditions” is broad enough to incorporate an applicant or property owner wanting to be present at a site visit. As such, the final regulation does not include additional language on this specific issue.

Requesting Copies of Filings:

Comment: While agreeing that the record should be made available early in the process, one commenter suggested that requiring the applicant to provide papers to any person within 5 days of a request could easily be abused. For example, the regulation would not prevent the situation where a large group seeks to appeal and each person requests a copy, or parties’ request copies without a real intent to appeal. Such requests could become unduly burdensome to the applicant.

Response: 310 CMR 10.05(7)(j)(2)(d) has been revised to address these concerns.

Major or Complex:

Comment: One comment suggested that parties should be able to designate their cases as major or complex, or request such designation.

Response: The final regulations include language to allow parties to request a case designation of Major or Complex. See 310 CMR 10.07(j)(2)(b)(vii) and 310 CMR 10.07(j)(4)(a)(v).

Other topics:

Comment: One comment suggested that the regulations should include a deadline for issuing a prescreening report.

Response: The concept embodied in these regulations is to have a condensed time schedule that will require the Presiding Officer to issue a prescreening report “quickly.” As such, a specific

deadline for this document has not been added to the regulations, although as a matter of practice Presiding Officer's will endeavor to issue reports within 7 days of a prescreening.

Comment: One comment suggested that the regulation should allow discovery.

Response: The final regulation does not change the discovery provision, which is the same as currently applies to all adjudicatory hearings.

Comment: Does the regulation allow motion practice?

Response: While the draft regulation was silent on motion practice, the final regulation does include language regarding motions, making clear that dispositive motions can be filed. However, motions will not alter the appeal schedule.

Comment: The regulation should allow Presiding Officer to issue orders to show cause.

Response: The regulations incorporate 310 CMR 1.01(5), "*Powers of Presiding Officer, Rights of the Parties,*" which expressly authorizes orders to show cause.

Comment: Comments suggested that the provision allowing MassDEP to choose not to participate beyond filing a Response should be eliminated or that the Presiding Officer should have the authority to require MassDEP's participation.

Response: The final regulation does not include this provision.

Comment: Conservation Commission appeals should be expressly limited to Conservation Commissions in the municipality where a project is located.

Response: Current regulations do not impose this limitation, which is not changed by these revisions.

Comment: Some comments suggested that the language requiring parties to expressly request a hearing would cause parties to inadvertently lose their right to a hearing. Some comments supported the requirement.

Response: The final regulation does not include a requirement that parties expressly request a hearing in their Appeal Notice or Direct Case.

Comment: Some comments suggested that the regulation should allow for the filing of closing briefs.

Response: Given that the parties Direct Cases and Rebuttals will be more comprehensive than in past practice, and that the time line is very tight, the regulations do not expressly provide for closing briefs.

Comment: Some comments were critical of MassDEP Regional Offices that issue superseding orders of conditions that do not agree with the local conservation commission order of conditions.

Response: The proposed regulations do not affect the issuance of a superceding order, determination or variance. The new regulations review the superceding order, determination or variance at the adjudicatory appeal stage after such issuance. These comments will be delivered to the MassDEP Bureau of Resource Protection for consideration.

Comment: One comment requested that MassDEP post all superceding orders of conditions ("SOC") on its website.

Response: MassDEP agrees that it would be useful for the public and for the agency to post all SOC's on its website. MassDEP is not currently able to implement this suggestion but is exploring future implementation options. The new regulations do require the SOC to be copied to all parties, including the party that requested the SOC, which is a change from past requirements that will improve access to decisions for parties who have expressed an interest in a particular application.